

0155 S Schatz



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

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**Decision**

**Matter of:** Stay, Incorporated

**File:** B-239825

**Date:** September 21, 1990

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Karl Dix, Jr., Esq., and Lisa Pender Morse, Esq., Smith, Currie & Hancock, for the protester.  
Howard Shecter, Esq., and Gary L. Brooks, Esq., National Archives and Records Administration, for the agency.  
Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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**DIGEST**

Protest is sustained where agency based decision not to set guard services procurement aside for small business concerns on conclusion that small businesses likely would not have resources to perform satisfactorily and on another agency's difficulties in obtaining offers from responsible small businesses, where (1) agency did not investigate any small business's capability to perform, and (2) the other agency's facility is outside the immediate area in which the subject building is located, and information relied upon was from procurement conducted 3 years ago, so that the small business competition in that instance was not a reasonable basis for comparison.

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**DECISION**

Stay, Incorporated protests a determination by the National Archives and Records Administration (NARA) not to set aside for exclusive small business competition request for proposals (RFP) No. NAMA-N2-P-0003, for security guard services at the National Archives Building in Washington, D.C. Stay contends that there was sufficient reason to expect adequate competition by small businesses at reasonable prices to require a small business set-aside.

We sustain the protest.

An acquisition of services, such as here, is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable

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expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. FKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. However, an agency must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work, and we will review a protest to determine whether an agency has done so. The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129.

NARA reports it concluded it was unlikely that at least two offers from small businesses would be received, because (1) the Department of Justice (DOJ) told NARA that no small businesses submitted offers under a recent set-aside for similar security guard services at a DOJ facility in Rockville, Maryland; (2) NARA had difficulty obtaining quality performance from the small businesses responsible for guard services at certain presidential libraries (Gerald R. Ford and Herbert Hoover); and (3) it was unlikely that a small business would have sufficient expertise and financial resources to meet the contract requirements, including providing a trained professional staff of at least 50 security officers.

NARA proceeded to publish a synopsis in the Commerce Business Daily (CBD) on April 5, 1990, announcing that the solicitation for guard services at NARA would be issued on an unrestricted basis. In response, NARA received approximately 70 letters requesting solicitation packages, at least 4 of which specifically identified the requesting firms as small businesses. Proposals received by the June 6 closing date have been held unopened, pending our decision here.

We find NARA did not reasonably determine that there was no likelihood of receiving offers from at least two responsible small businesses.<sup>1/</sup> First, the mere fact that DOJ may have been unsuccessful in generating small business competition at a facility in Rockville, Maryland, does not warrant a conclusion that no small businesses would compete for the requirement at the National Archives Building in Washington,

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<sup>1/</sup> The NARA Office of Inspector General (OIG) has initiated a review of alleged improprieties in connection with this procurement. The review has not been completed, but the OIG has furnished information from its investigation to our Office.

D.C., a different jurisdiction some distance from Rockville. This is particularly the case given that the record shows NARA did not even contact DOJ prior to making its determination here. Rather, NARA relied on information DOJ had furnished in connection with NARA's award of a contract to the current incumbent, Vance International, in 1987, 3 years earlier.

NARA states its determination also was based on information furnished by the Library of Congress and the Smithsonian Institution, but the record similarly shows that the contracting officer did not contact the Library until after the RFP was issued on a non-set-aside basis (NARA never actually contacted the Smithsonian). Moreover, the information furnished was only that the guard services at those buildings were provided by government personnel (the information concerning the Smithsonian reportedly had been received in prior years), not that recent attempts to secure acceptable small business competition had been unsuccessful. Again, we fail to see how this information, which in any case is undocumented in the record, suggests that no adequate small business competition would be received for the current procurement.

NARA's concerns based on its experiences at the Ford and Hoover Libraries also did not justify the decision not to set the procurement aside. The agency generally describes only broad performance problems at the libraries, except for two specific points concerning the Hoover Library--problems obtaining guard certifications from the state, and delays in the contractor's obtaining a COC--neither of which appears to be a matter within the contractor's control. More fundamentally, even if we accept that certain small business performance problems have arisen at the libraries, NARA has not attempted to explain why problems with small businesses in Iowa or Michigan would have any bearing on small business performance, or, more to the point, on the likelihood of receiving adequate small business competition, in Washington, D.C.

NARA's general belief that it would have difficulty obtaining offers from small business concerns capable of providing a professional staff of at least 50 guards and meeting the other technical requirements was not a valid basis for its decision not to set the requirement aside. There is no indication in the record that the agency ever investigated or considered whether any small business would be able to meet the performance requirements under this IFB, see The Taylor Group, Inc., B-235205, supra, and the factors the agency did take into account, discussed above, in no way supported such a conclusion. Nor has NARA presented any

evidence in connection with the protest that now would support its conclusion. Rather, NARA merely assumed that the requirements under the RFP here were so stringent that no small business likely could meet them. Not only do we find no support for this assumption, but NARA's own prior experience with this guard services requirement belies NARA's position that small businesses would be incapable of performing based on factors related to their small size; Vance, the incumbent contractor, was a small business (it apparently recently became large) when it initially was awarded the contract for this requirement, and apparently has been providing satisfactory service under a virtually identical statement of work.

The record strongly indicates that a principal motivation behind NARA's determination not to set this requirement aside was its desire to avoid potential delays from the need to refer a small business nonresponsibility determination to the Small Business Administration (SBA) for a Certificate of Competency (COC) review.<sup>2/</sup> Such a potential delay was not a basis for deciding not to set the requirement aside. Again, this concern reflects an unjustified presumption that any small business bidder would be found nonresponsible in the first instance. Absent some proper factual basis for a conclusion that small businesses would be unable to perform the requirement satisfactorily, there was no basis for proceeding as if that were the case.

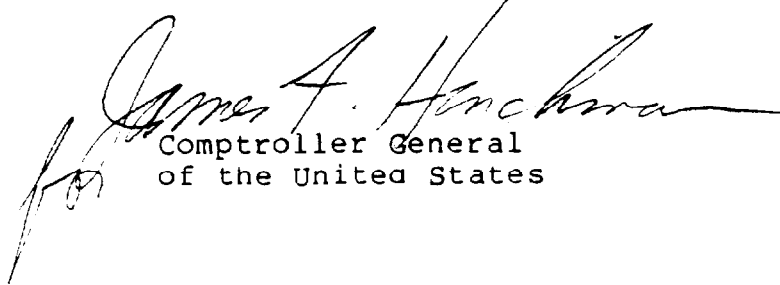
As the record does not establish any basis for concluding that small business bidders would not be capable of performing or would not offer reasonable prices, NARA's determination not to set the requirement aside was improper. As indicated above, four small business firms, plus Stay, now have expressed interest in competing for the contract. Therefore, by separate letter to the Archivist of the United States, we are recommending that the agency cancel the RFP and resolicit on a small business set-aside basis. We also

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<sup>2/</sup> In a July 2, 1990 NARA OIG interview, an agency official stated that "[f]irst and foremost was the desire to make sure the contract would be awarded on October 1, 1990 . . . . A major concern was that obtaining a [COC] . . . generally takes 60 days . . . ."

find Stay entitled to be reimbursed its protest costs.  
4 C.F.R. § 21.6(a)(1) (1990); see Falcon Carriers, Inc.  
68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

The protest is sustained.

  
Comptroller General  
of the United States